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May 18, 2005

DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: August 24, 2004

Case No.: TIA-0177

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. The OWA referred the application to an independent Physician Panel (the Panel), which determined that his illnesses were not related to work at the DOE. The OWA accepted the Panel's determination, and the Applicant filed an Appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the Appeal should be granted.

*I. Background*

**A. The Relevant Statute and Regulations**

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B established a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D established a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004) (the Authorization Act). Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. *Id.* § 3681(g). In addition, under Subpart E, an applicant is deemed to have an illness related to a workplace toxic exposure at DOE if the applicant received a positive determination under Subpart B. *Id.* § 3675(a).

During the transition period, in which DOL sets up the Subpart E program, OHA continues to process appeals of negative OWA determinations.

## B. Procedural Background

The Applicant worked as a security guard at the Savannah River site (the site) for approximately 13 years - from 1983 to 1996. He filed a Subpart D application with OWA, claiming that two illnesses - scleroderma and chronic renal disease - were related to toxic exposures during employment at DOE. The OWA referred the application to the Physician Panel.

The Physician Panel issued a negative determination. The Panel found that the renal disease was a complication of the scleroderma. The Panel acknowledged that toxic exposures could cause scleroderma, but the Panel stated that it found no evidence of toxic exposures and, therefore, did not even reach the issue of causation.

The OWA accepted the negative determination, and the Applicant filed an appeal. In his appeal, the Applicant states that the Panel did not have the opportunity to consider information about

his exposures. The Applicant states that he requested information from the site and received it after the Panel issued its report, and the Applicant encloses the information. The Applicant further states that his job was to monitor construction workers in construction areas; he identifies those locations and the claimed toxic exposures. He states that the construction workers had personnel protective equipment, but he did not.

## *II. Analysis*

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to exposure to toxic substances during employment at a DOE facility. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to toxic exposure at the DOE site, and state the basis for that finding. 10 C.F.R. § 852.12. The Rule required that the Panel's determination be based on "whether it is at least as likely as not that exposure to a toxic substance" at DOE "was a significant factor in aggravating, contributing to or causing the illness." *Id.* § 852.8.

Further consideration of this application is warranted. Although an applicant bears primary responsibility for documenting his claim, the DOE assists applicants as it is able. 67 Fed. Reg. 52841, 52844 (2002). In this case, the site had exposure information that was not provided to OWA and, therefore, not sent to the Physician Panel. This failure cannot be characterized as harmless error: the Panel report based its negative determination on the lack of exposure information. Accordingly, consideration of the site exposure information, as well as the Applicant's detailed description of his duties and his exposures, is warranted.

As the foregoing indicates, the application warrants further consideration. In compliance with Subpart E, the claim will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims. OHA's grant of this appeal does not purport to dispose of or in any way prejudice the DOL's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy, Case No. TIA-0177, be, and hereby is, granted.

(2) Based on the exposure information provided with the appeal, further consideration of this application is warranted,

(3) This is a final order of the Department of Energy.

George B. Breznay  
Director  
Office of Hearings and Appeals

Date: May 18, 2005